

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 110 OF 2022

Sayyed Jamin Ali S/o Syed Yunusali
& others

Appellants

Versus

Mohd. Sajjed Hussain Mohd. Abed Hussain

Respondent

Mr. S. S. Kazi, Advocate for the appellants.

Mr. V. V. Bhavthankar, Advocate for the respondent.

CORAM : R. M. JOSHI, J.

DATE : 13th MARCH, 2023.

PER COURT :

1. This appeal takes exception to the judgment and decree dated 13th March, 2012, passed by the 5th Joint Civil Judge Junior Division, Ambajogai in Regular Civil Suit No. 88/2001 and the judgment and decree dated 20th August, 2019 passed by the District Judge – 3, Ambajogai in Regular Civil Appeal No. 76/2012.

2. The plaintiff/respondent had filed Regular Civil Suit No. 88/2001 for declaration of title and possession of the suit property. He has raised his claim on the basis of the sale-deed executed by the erstwhile owner in his favour. It is further contended that

there is an encroachment of portion of land belonging to plaintiff and removal of the encroachment is sought.

3. Defendants resisted the suit by filing written statement disputing the title of the plaintiff over the encroached portion of land. It is sought to be contended that during implementation of the consolidation scheme, excess land i.e. 1H 4R land has been recorded in the name of the predecessor of plaintiff and by taking disadvantage of the same, sale-deed came to be executed in his favour. It is sought to be contended that the plaintiff has no title over the alleged encroached portion of land.

4. The parties led evidence before the trial Court. The learned trial Court framed various issues including the issue as to whether the plaintiff has proved his title over the suit field Gat No. 302 admeasuring 1 H 4 R from village Saigaon. Similarly, burden was cast upon the plaintiff to prove that the defendants have encroached upon 19 R land from Gat No. 302.

5. Learned counsel for the appellants states that the First Appellate Court has failed to formulate point for determination and

therefore, the judgment of the First Appellate Court deserves interference for want of compliance of Order XLI Rule 31 of the Code of Civil Procedure. In response to the said submission, it is pointed out that the learned First Appellate Court has specifically taken note of two points which were required determination and findings are also recorded on evidence on record before the Trial Court.

6. The other contentions of learned counsel for the appellants are that there is no evidence to show that the plaintiff is the owner and has title in respect of Gat No. 302, more particularly, alleged portion of encroached area from the said land and also that the survey carried out by the Cadastral Surveyor was behind back of the defendants without notice being issued to them.

7. He placed reliance on judgment of the Apex Court in case of Santosh Hazari vs. Purshottam Tiwari, **(2001) 3 SCC 179** to submit that there is no application of independent mind to the facts of case by Appellate Court. Reference is also made to judgment of this Court in case of Rambhau Mule vs. Balabhau Kachare, **2019 DGLS (Bom.) 1583** to argue that notice of the measurement is must and joint measurement is necessary.

8. Above contentions are opposed by learned counsel for the respondent by submitting that in the consolidation scheme 1 H 4 R land was rightly shown to be in possession of the previous owner of the said land. It is submitted that the defendants have never claimed that no notice of survey while carrying out measurement on the disputed land was given to them nor any application was made before the Trial Court or the First Appellate court for fresh measurements.

9. There is no dispute about the fact that the plaintiff on the basis of registered sale-deed is claiming title over Gat No. 302. Further, there is no dispute that in the consolidation scheme, the previous gat numbers were consolidated and the said aspect has been duly considered by the First Appellate Court in its judgment. It is held therein that considering the lands held by the erstwhile owners before consolidation scheme, the consolidation scheme showing 1H 4R land in his possession is proper.

10. So far as title of plaintiff over Gat No. 302 is concerned, plaintiff has based his claim relying upon registered sale deed No. 3167/1980 (Exhibit 120) executed by erstwhile owner Mohd. Sikandar. He also claims possession over said land since then. It is

alleged that defendants No 1 to 3 have encroached upon the suit land by breaking boundaries. Defendants, on the other hand, denied ownership of Mohd. Sikandar over 1H 04 R land. It is claimed by defendant No. 1 that he purchased 56 R 1 and in Gat. No. 302 from Sayyad Muktarali.

11. Plaintiff has relied upon statements recorded during consolidation scheme. By examining witness PW 3, from office of T.I.L.R., factum of amalgamation of Survey No. 70/1/1, 70/2/1 and 70/2/2 comprising 35R, 21R, 13R and 35 R respectively is proved. Trial Court has held that total area of these four survey numbers tallies total area of Gat No. 302 i.e. 1 H 04 R. There is nothing on record to indicate that the consolidation scheme was ever taken exception to. On the other hand, defendant No. 1 was unable to say when the land in question was given to him for cultivation. He was further not able to say since how long he is in possession of 27 R land. As far as land held by Mohd. Sikandar, testimony of this witness is not reliable for want of personal knowledge.

12. In the light of aforesaid defence, the findings recorded by learned Trial Court about title of plaintiff and his predecessor Mohd.

Sikandar over Gat No. 302, can not be challenged. Learned First Appellate Court has also reappreciated entire evidence on record and came to similar conclusion. This is not the case where First Appellate Court has failed to apply its mind to the material evidence on record. Hence, judgment in case of Santosh Hazari (supra) has no application to this case.

13. As far as challenge to the measurement is concerned, the initial burden is on the plaintiff to prove that there is proper measurement of the disputed land and that once by examining the Cadastral Surveyor, the plaintiff has discharged the said burden, the onus shifts upon the defendants to show that before carrying out measurement they were not issued with the notice. In this regard, perusal of written statement does not indicate any such specific plea having been taken by the defendants. It is vaguely stated that behind their back, measurement was carried out. Apart from this, perusal of the cross-examination of the Cadastral Sureyor also does not show that any specific question was put to him with regard to issuance of notice to the defendant in particular prior to carrying out of the measurement. In absence of such specific plea being raised in the written statement or suggestion in the cross examination to the

Cadastral Surveyor, now it is not open for the appellants to take exception to the findings recorded by both the Courts below in respect of measurements.

14. It is material to note that the learned Trial court has accepted the report of the Cadastral Sureyor and the measurement indicating encroachment done by defendant No. 2. Inspite of such findings which were being challenged before the First Appellate Court, the appellants herein have failed to take any steps to obtain any order from the First Appellate Court for carrying out fresh survey and measurement of the property. Pertinently, after having failed to take steps for appointment of Surveyor to carry out fresh measurements after the plaintiff was successful in proving his case, now it is not open for the appellants/defendants to seek measurements again.

15. Insofar as the objection regarding non-framing of points for consideration as contemplated by Order XLI Rule 31 of the Code of Civil Procedure is concerned, the judgment of the First Appellate Court clearly shows that all points were taken into consideration for determination and the findings are also recorded thereon by the First

Appellate Court. The judgment of the First Appellate Court indicates that the evidence on record is duly considered by the First Appellate Court in proper perspective. Merely because the points for determination are not separately mentioned, it cannot be called as non-compliance of Order XLI Rule 31 of the Code of Civil Procedure.

16. Coming to the scope of Section 100 of the Code of Civil Procedure and powers of High Court to cause interference in the judgments impugned, reference can be made to the judgment in the case of Ramathal vs. Marutathal, **AIR 2018 SC 340** wherein the Apex Court has observed thus :-

“15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the high court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved

and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the high Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

17. In Tulsidhara and another vs. Narayanappa and others (2019) 6 SCC 409, the Apex Court has reiterated thus :-

“7.1 It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of the CPC after the 1976

amendment, is confined only with the Second Appeal involving a substantial question of law. The existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC.

7.2 As observed and held by this Court in the case of Kondiba Dagadu Kadam vs Savirtibai Sopan Gujar, (1999) 3 SCC 722, in the Second Appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being : (1) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on inadmissible evidence or no evidence. It is further observed by this Court in the aforesaid decision that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in Second Appeal.

7.3 When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in the case of *Ishwar Das Jain vs. Sohan Lal* (2000) 1 SCC 434. In the aforesaid decision, this Court has specifically observed and held :

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

7.4 Considering the law laid down by this Court in the aforesaid decisions and even considering Section 100 of the CPC, the substantial question of law framed by the High Court in the present case, as such, cannot be said to be a substantial question of law at all.

18. In Damodar Lal vs. Sohan Das and others **(2016) 3 SCC 78**, the Apex Court has held thus :-

“8. “Perversity” has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backaim, it has been held at para 11 that : (SCC pp.192-93)

11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the finding of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of act of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect.”

19. There are concurrent findings recorded by both the Courts below. There is nothing on record to indicate that the

findings recorded by these Courts are contrary to evidence on record to term it as perverse. This Court, therefore, finds no substantial question of law involved in this appeal. As a result, the appeal stands dismissed. No order as to costs.

20. Pending application, if any does not survive and stands disposed of.

21. Learned counsel for the appellants seeks continuance of stay which is in the form of statement made on behalf of the respondent for further period of eight weeks. In the interest of justice, the said statement to continue for a period of six weeks from today.

(R. M. JOSHI)
Judge

dyb